

COMMENTS

IS ANYTHING EVER FREE?: NAFTA'S EFFECT ON UNION ORGANIZING DRIVES AND MINORITIES AND THE POTENTIAL OF FTAA HAVING A SIMILAR EFFECT

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I. Introduction.....	310
II. Historical Role of Labor Unions and Workers in the United States: Making the Connection to Free Trade.....	314
III. Leading Up to NAFTA and FTAA	316
A. International Agreements Leading to NAFTA	316
B. Other Free-Trade Pacts of the Western Hemisphere ...	318
1. MERCOSUR	319
2. The Andean Pact	320
3. The Central American Common Market (CACM). ..	320
4. The Group of Three (G-3)	321
5. The Caribbean Community (CARICOM)	321
6. Summary.....	321
IV. The Expectations of NAFTA and the Realization of Those Expectations	322
A. Expectations of Those Supporting NAFTA	322
B. Expectations of Those Opposing NAFTA	324
C. Realization of the Expectations	325
1. Proponents' Viewpoints	325
D. Broken Promises	326
1. Opponents' Viewpoints.....	326
V. The Problem	330
A. Job Insecurity	330

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B. Impact of Threats of Plant Closure on Union Organizing Drives	331
C. Exponential Impact on Women and Minorities	332
VI. Alternatives and Enhancements to NAFTA – Suggestions for FTAA	334
A. Corporate Fines	334
B. NAFTA-TAA	335
C. Private Litigation	336
D. Fast-Track Authority	336
E. Eliminating “Side” Accords	337
VII. Conclusion	337

The North American Free Trade Agreement (NAFTA)¹ and its side labor agreement, the North American Agreement on Labor Cooperation (NAALC),² both went into effect on January 1, 1994.³ These agreements, supporting globalization⁴ between Canada, Mexico, and the United States, were signed with the intent of increasing economic growth and employment in all three countries over a fifteen-year period.⁵

NAFTA proponents believed that it would serve as a stimulus for long-term economic gains for all of the countries involved.⁶ While these advo-

1. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296 [hereinafter NAFTA]. President Bill Clinton signed the NAFTA Implementation Act on December 8, 1993. See North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182 (1993) [hereinafter NAFTA-IA].

2. North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499 (1993) [hereinafter NAALC].

3. See Betty Southard Murphy, *NAFTA's North American Agreement on Labor Cooperation: The Present and the Future*, 10 CONN. J. INT'L L. 403, 403 (1995) [hereinafter Murphy, *Present and Future*]; see also Betty Southard Murphy, *Washington: The Center for Strategic and International Studies 1994*, 16 NW. J. INT'L L. & BUS. 318, 318 (1995) (book review) [hereinafter Murphy, *Washington*]; Teresa R. Favilla-Solano, Comment, *Legal Mechanisms for Enforcing Labor Rights Under NAFTA*, 18 U. HAW. L. REV. 293, 295 (1996); Bernard L. Weinstein, *NAFTA After Four Years: Successes, Problems, and Challenges*, 4-SUM NAFTA: L. & BUS. REV. AM. 109, 109 (1998).

4. See Michael H. Davis & Dana Neacsu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 UMKC L. REV. 733, 734 (2001) (describing globalization as “a political phenomenon whose strategy is to internationalize capitalism through a process of legalization”); see also THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 9 (2000) (finding that “the driving idea behind globalization is free-market capitalism . . . globalization means the spread of free-market capitalism to virtually every country in the world”).

5. See Murphy, *Present and Future*, *supra* note 3, at 404; see also NAFTA, *supra* note 1; NAFTA-IA, *supra* note 1; Murphy, *Washington*, *supra* note 3, at 318 (stating the goals of NAFTA).

6. See Murphy, *Present and Future*, *supra* note 3, at 404 (suggesting that competition with the European Union and Asia were also important in the implementation of

cates suggest the trade agreement has been successful, others disagree.⁷ Opponents point to, among other things, the ineffectiveness of the labor accord in protecting workers and major job losses in various industries.⁸ Specifically, NAFTA has negatively impacted labor union organizing drives, ethnic minorities, and women in the United States. Today, the debate on NAFTA's ramifications rages on while negotiations to create a new western hemispheric trading bloc, with many trade leaders touting NAFTA as an appropriate model from which to build upon, are underway.⁹ This comment asks, what is the cost of free trade? The answer is that nothing is ever free. Instead, union organizing drives and minorities are paying the price for "free" trade.

The question of who pays for "free" trade is important because of the potential of the Free Trade Area of the Americas (FTAA) having the same effect on minorities as NAFTA. If NAFTA, which includes only Canada, Mexico, and the United States, has had a negative impact on union organizing drives and minority employees, then FTAA, which will include most of the Western Hemisphere, will have an even greater impact on these groups. FTAA should not be allowed to repeat NAFTA's mistakes. Given the problems NAFTA has created for organized labor, minorities, and women, another blueprint should be utilized for the more encompassing FTAA. Otherwise, the United States government, by way

NAFTA); see also Favilla-Solano, *supra* note 3, at 293-94 (agreeing that competition with other trade agreements like the European Economic Community and the Caribbean Common Market were driving forces in creating NAFTA).

7. See Sidney Weintraub, *The Meaning of NAFTA and its Implications for the FTAA*, 6 NAFTA: L. & BUS. REV. AM. 303, 303 (2000); see also PUBLIC CITIZEN, *NAFTA AT FIVE—SCHOOL OF REAL LIFE RESULTS* (1999) [hereinafter PUBLIC CITIZEN, *NAFTA AT FIVE*] (finding that NAFTA has ultimately failed in providing the benefits that were promised by proponents), available at <http://www.citizen.org/trade/nafta/votes/articles.cfm?ID=6473> (last visited Feb. 12, 2002); UNION OF NEEDLETRADES, INDUSTRIAL, AND INDUSTRIAL TEXTILE EMPLOYEES (UNITE), *THE NAFTA SCAM* (1997) (criticizing NAFTA for taking jobs and being a disaster for workers' rights in the United States, Canada, and Mexico), available at <http://www.uniteunion.org/reclaim/politicalarchive/nafta/nafta.html> (last visited Feb. 20, 2002).

8. See Favilla-Solano, *supra* note 3, at 298-301 (1996) (detailing the viewpoints of various opponents of NAFTA); see also Michael S. Barr et al., *Labor and Environmental Rights in the Proposed Mexico-United States Free Trade Agreement*, 14 HOUS. J. INT'L L. 1, 1-3 (1991) (asserting the concerns of labor advocates and environmentalists with the then proposed NAFTA); William Cunningham & Segundo Mercado-Llorens, *The North American Free Trade Agreement: The Sale of U.S. Industry to the Lowest Bidder*, 10 HOFSTRA LAB. L.J. 413, 413-15 (1993) (discussing the problems associated with Mexican *maquiladoras*).

9. See Ambler Moss & Stephen Lande, *A Critical Year For Hemispheric Free Trade: Can Countries Agree on a Blueprint?*, 28 U. MIAMI INTER-AM. L. REV. 507, 509-516 (1997) (recognizing the difficulty the United States has had gaining fast track authority for FTAA, and the effect this has on establishing a hemispheric free trade zone).

of free trade agreements, will continue to exacerbate racial and gender divides within this country.¹⁰

I. INTRODUCTION

NAFTA proponents have expected great benefits from this North American partnership since its enactment.¹¹ The United States was expected to become more competitive in the global economy, and the George H. Bush administration anticipated the creation of 320,000 more jobs for the United States alone.¹² Debatably, the State of Texas has reaped the most benefit from the agreement,¹³ and the economic boom of the 1990s has been attributed in part to NAFTA.¹⁴ But, even prior to the NAFTA agreement, opponents urged each country to realize that free trade would not only lead to economic gains, but could also lead to significant problems for labor standards, workers' rights, and union organizing drives.¹⁵

The effect of NAFTA on union organizing drives is of particular concern to minorities and women. Situations that have a negative impact on America's organized workers have an exponential impact on the minority community.¹⁶ These individuals have a disproportionately higher number of jobs in the industries that are most affected by NAFTA.¹⁷ Addition-

10. See Jose E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303, 303 (1996-97) (utilizing critical race theory to examine NAFTA's Chapter Eleven Provisions that govern foreign direct investment).

11. See Thomas J. Schoenbaum, *The North American Free Trade Agreement (NAFTA): Good for Jobs, Good for the Environment, and for America*, 23 GA. J. INT'L & COMP. L. 461, 466-467 (1993) (utilizing economic studies to demonstrate that NAFTA would have a small impact on labor in the U.S.); see also *For NAFTA*, THE NEW REPUBLIC, Oct. 11, 1993, at 1.

12. See Favilla-Solano, *supra* note 3, at 297.

13. See Weinstein, *supra* note 3, at 110 (identifying Texas as the largest exporting state to Mexico, totaling \$18.9 billion). But see PUBLIC CITIZEN, NAFTA'S BROKEN PROMISES: THE COST TO TEXAS OF OUR FAILED EXPERIMENT WITH NAFTA [hereinafter PUBLIC CITIZEN, BROKEN PROMISES] (determining that NAFTA has created health and safety issues for Texans, as well as job losses).

14. See Weinstein, *supra* note 3, at 112-113 (stating that from 1994-1997 U.S. exports to its NAFTA partner Mexico increased sixty-nine percent to \$71 billion); see also Weintraub, *supra* note 7, at 306 (estimating that over 15 million jobs have been added to the economy since NAFTA went into effect).

15. See Favilla-Solano, *supra* note 3, at 295, 298-301.

16. See Clarence Lusane, *Persisting Disparities: Globalization and the Economic Status of African Americans*, 42 HOW. L.J. 431, 434 (1999) (recognizing that generally the black community suffers disproportionately from globalization); see also Lester Henry, NAFTA AND GATT: WORLD TRADE POLICY IMPACTS ON AFRICAN AMERICANS (1995).

17. See Lusane, *supra* note 16, at 443-45 (noting women, Blacks, and Latinos as having more jobs in the manufacturing and apparel industries, the sectors most negatively im-

ally, these groups have a history of discrimination in the workplace, and therefore would have a greater need for the protections union membership is intended to provide.¹⁸ Collective bargaining emphasizes equal pay and fair treatment in the workplace, two things that are essential for women and minorities.

President Bill Clinton negotiated the North American Agreement on Labor Concerns (NAALC),¹⁹ in an attempt to lay the labor movement's fears to rest. Before the implementation of NAALC, free trade and labor movements were not directly linked to each other through any written agreements.²⁰ For the first time, the United States attempted to address the anxieties of the labor movement in a free trade agreement (FTA).²¹ Political ties between Mexican labor unions and the Mexican government, however, caused doubt that unions could effectively represent

pacted by NAFTA); Stanley M. Spracker & Gregory J. Mertz, *Labor Issues Under the NAFTA: Options in the Wake of the Agreement*, 27 INT'L LAW. 737, 738 (1993) (citing *Potential Impact on the U.S. Economy and Selected Industries of the North American Free Trade Agreement*, Inv. No. 332-337, U.S.I.T.C. Pub. 2596, at 2-5 (Jan. 1993)) (acknowledging the automobile and apparel as industries expected to "experience losses" as a result of NAFTA).

18. DENNIS A. DESLIPPE, *RIGHTS NOT ROSES: UNIONS AND THE RISE OF WORKING-CLASS FEMINISM, 1945-80*, at 117 (2000) (acknowledging that the struggles of racial and gender equality in the labor movement are intertwined, as evident throughout Title VII of the Civil Rights Act of 1964). Cf. *Organized Labor in the Twentieth-Century South* 60-112 (Robert H. Zieger, ed. 1991) [hereinafter *ORGANIZED LABOR*] (highlighting the roles that race and gender played in southern labor history). See also MELINDA CHATEAUVERT, *MARCHING TOGETHER: WOMEN OF THE BROTHERHOOD OF SLEEPING CAR PORTERS* (1998) (detailing the participation of women in the establishment of the first national trade union for African Americans). But see Benjamin W. Wolkinson, *Blacks, Unions, and the EEOC* (1973) (challenging racial and gender discrimination within the unions themselves). See generally JOHN C. BERG, *UNEQUAL STRUGGLE: CLASS, GENDER, RACE, AND POWER IN THE U.S. CONGRESS* (1997) (arguing that the capitalist economy structure works against progressive congressional action).

19. The Side Agreement on Environmental Cooperation was also negotiated as a second side agreement to address environmental concerns. North American Agreement on Environmental Cooperation (NAAEC), Sept. 13, 1993, 32 I.L.M. 1480; see also Jonathan S. Blum, *The FTAA and the Fast Track to Forgetting the Environment: A Comparison of the NAFTA and the MERCOSUR Environmental Models as Examples for the Hemisphere*, 35 TEX. INT'L L. J. 435, 442, 448 (2000) (presenting a blueprint for an FTAA environmental model based on the MERCOSUR and the NAFTA environmental regimes).

20. See Karen Vossler Champion, Comment, *Who Pays for Free Trade? The Dilemma of Free Trade and International Labor Standards*, 22 N.C. J. INT'L L. & COM. REG. 181, 224 (1996).

21. See *id.*

Mexican labor objectives.²² NAALC addressed the labor movements' concerns in Canada, Mexico, and the United States.²³

Since the nation was operating at near full employment through most of the 1990s,²⁴ it would seem as if wages would have increased and workers would have had more job security. However, worker earnings did not increase and employees did not enjoy increased job security.²⁵ Job security is lacking due to the increased fear stemming from employers' enhanced opportunity to move to another country, namely Mexico, to exploit cheap labor.²⁶

The global economy has made many employees fearful that they are dispensable.²⁷ Employers suppress wages through threats of shifting production²⁸ to other countries.²⁹ The fear of plant closures has also impacted union organizing drives because employers use the threat of mobility, among other tactics, as a way to intimidate workers and make them afraid to join unions.³⁰

NAFTA has had a substantial impact on American workers. Subsequently, this has negatively affected labor union organizing drives, minor-

22. *Id.* at 225 (stating that concerns arose due to Mexico's relaxed enforcement of their existing labor laws); *see also* Favilla-Solano, *supra* note 3, at 302-317 (noting that although Mexico has extensive labor legislation, these laws are rarely enforced).

23. Roy J. Adams & Parbudyal Singh, *Early Experience with NAFTA's Labour Side Accord*, 18 COMP. LAB. L.J. 161, 162 (1997); *see also* Favilla-Solano, *supra* note 3, at 295 (stating that in response to these concerns, the three nations negotiated side agreements on environmental and labor cooperation).

24. *See* Weintraub, *supra* note 7, at 306 (identifying the United States as almost at full employment status).

25. *See id.* at 307; *see also* KATE BRONFENBRENNER, *UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING* 8 (2000).

26. *See* Weintraub, *supra* note 7, at 304-05 (expressing concern regarding the motives behind trade agreements); *see also* BRONFENBRENNER, *supra* note 25, at 8.

27. BRONFENBRENNER, *supra* note 25, at 8 (explaining findings of threats by employers of plant closures).

28. "Shifting production" is a phrase used to describe the process when parts and components are shipped to a country like Mexico to undergo final assembly, and then exported to another country like the United States for consumption. David A. Gantz, *The United States and the Expansion of Western Hemisphere Free Trade: Participant or Observer?*, 14 ARIZ. J. INT'L & COMP. LAW 381, 383 (1997).

29. Weintraub, *supra* note 7, at 307 (explaining the wage-depressing effect in the United States due to the availability of cheaper labor and parts in developing countries).

30. BRONFENBRENNER, *supra* note 25, at 8 (stating that employers use threats of plant closure and mobility in an attempt to negatively impact union organizing campaigns).

ities, and female employees.³¹ This is very important in light of the fact that negotiations are underway to enact the FTAA.³²

The FTAA would include the three NAFTA countries as well as all other nations in the Western Hemisphere (except Cuba), thereby creating the largest free trade zone in the world.³³ FTAA would span from the tip of Argentina to the top of Alaska.³⁴ The plans for FTAA began in December 1994 at the Summit of the Americas in Miami, Florida, where the leaders of all thirty-four American democracies agreed to enact a free trade agreement by 2005.³⁵ Given the detrimental impact of NAFTA on union organizing drives and minorities, NAFTA should not be used as the basis for the FTAA.

This comment will discuss the negative impact that NAFTA has had on union organizing, and the resulting impact on minority and women workers. The argument is that NAFTA should not be used as the only model for FTAA, given the problems it has created for labor union organizing drives, minorities, and women. Other alternatives, including subsequent enhancements to NAFTA, can be utilized as the basis for FTAA, which will protect minority workers' ability to remain fairly paid, safe, and secure in their jobs in an expanded free trading bloc.

31. See *id.* NAFTA increased the trade deficit and contributed to a competitive global economy. See *id.* In turn, this terminated many jobs and closed plants in the United States. See *id.* at 7. The opportunities to be aboard allowed companies to threaten employees that unionizing would cause plant closures. See *id.* at 8. Further, in NAFTA's first three years of existence, it caused 395,000 jobs to be lost. Jesse Rothstein & Robert Scott, *NAFTA's Casualties: Employment Effects on Men, Women, and Minorities*, available at <http://epinet.org/Issuebriefs/ibl20.html> (last visited Feb. 12, 2002). The United States' increased trade with Canada and Mexico between 1993 and 1996 caused 141,000 women to be unemployed and approximately 60,000 minorities to be unemployed. See *id.*

32. See David Lopez, *Dispute Resolution Under MERCOSUR from 1991 to 1996: Implications for the Formation of the Free Trade of the Americas*, 3-SPR NAFTA: L. & Bus. REV. AM. 3 (1997); *The Americas Drift Towards Free Trade*, ECONOMIST, Jul. 8, 1995, at 35 [hereinafter *Americas Drift*] (reporting that the United States favored an expansion of NAFTA by way of the FTAA).

33. See James B. Parks, *Opening Doors for Global Fairness, America at Work* (AFL-CIO, Washington, D.C.), June 2001, at 17, 18 (stating that the passage of FTAA is a high priority for both President George W. Bush and American big business).

34. Murphy, *Washington*, *supra* note 3, at 321.

35. Lopez, *supra* note 32, at 3 (suggesting that even if a hemispheric trade pact is not complete by 2005, a trading bloc of the Western hemisphere seems inevitable); see also Frederick M. Abbott, *Foundation-Building for Western Hemispheric Integration*, 17 Nw. J. INT'L L. & Bus. 900 (1996-97).

II. HISTORICAL ROLE OF LABOR UNIONS AND WORKERS IN THE UNITED STATES: MAKING THE CONNECTION TO FREE TRADE

"Unions: The people that brought us the weekend."³⁶

During the twentieth century, the American labor movement made great gains that benefited both unionized and non-unionized workers.³⁷ It is necessary to examine the history of the labor movement before being able to thoroughly connect labor issues with free trade. The following is a brief chronology of the labor movement from the years leading up to the passage of NAFTA to the present.

Although the labor movement came from humble beginnings, it has endured three centuries.³⁸ Nineteenth and early twentieth century employers, even more than today, identified labor as an exploitable commodity required for industrial development.³⁹ Early unions made many hard fought gains and faced resistance and violence along the way.⁴⁰ In 1886, the American Federation of Labor (AFL) was founded with the goal of using collective bargaining power to increase wage earnings and labor standards.⁴¹ By 1914, the "elite" working-class consisted of over 2 million AFL members.⁴² Although many early unions did not achieve this level of success, they all generally promoted fair labor standards and eight-hour work days.⁴³

In time, labor laws in the United States changed in favor of employees' protection instead of employers' profiteering.⁴⁴ The National Labor Relations Act recognizes the unequal power between employers, employees,

36. Author unknown, quote taken from a bumper sticker.

37. See generally, Champion, *supra* note 20, at 186 (stating that American unions' early struggles were beneficial for both unionized and non-unionized employees).

38. See *id.* at 190 n.50 (noting that there were early labor unions in the nineteenth and twentieth centuries); see also ARCHIBALD COX ET AL., *LABOR LAW* (13th ed. 2001) (noting that labor unions began as early as the eighteenth century).

39. Terry Collingsworth, *American Labor Policy and the International Economy: Clarifying Policies and Interest*, 31 B.C. L. REV. 31, 37 (1989); see also Champion, *supra* note 20, at 189 (stating that early labor unions were viewed as an exploited commodity).

40. See Cox et al., *supra* note 38, at 13-15; see also Champion, *supra* note 20, at 187-93. During this time, the military was used to minimize collective worker action. See *id.* at 190 n.54. The AFL overcame opposition and were successful in their labor agenda. *Id.*

41. See COX ET AL., *supra* note 38, at 13-14; see also Champion, *supra* note 20, at 190 n.54. The AFL membership increased, due in part to Congress' structural changes. BERG, *supra* note 18, at 84. AFL members assisted in electing unionists into Congress. *Id.* The unionists in Congress assured that the AFL's goals were included in the Progressive legislative program. *Id.*

42. See COX ET AL., *supra* note 38, at 13-14; see also Champion, *supra* note 20, at 190 n.54 (1996) (stating that the AFL's membership consisted of the "elite" working class).

43. See Champion, *supra* note 20, at 190.

44. See National Labor Relations Act of 1935, 29 U.S.C. § 151 (1994) [hereinafter NLR] (discussing the importance of protecting employee's rights to collectively bargain).

and unions.⁴⁵ At their peak during the 1950s, unions held 35% of all non-agricultural employees in the United States.⁴⁶

American workers formed unions to allow weak individuals to join together and prosper based on the idea that there is strength in numbers.⁴⁷ Women and minorities have historically been marginalized in the workplace, and benefit the most from collective bargaining.⁴⁸ Initially, however, unions, in many instances, vehemently opposed female and minority membership.⁴⁹ Women and minorities have since gained access to union membership. Currently, 11.7% of unionists are women.⁵⁰ In addition, Black men and women unionize at the highest rate of any racial group at 19% and 15%, respectively.⁵¹ Latino men's unionization rate is 12%, and Latina women are at 10%.⁵² Asian-American men and women both unionize at a rate of 12%.⁵³ By 2001, minority unionization rates compared to, if not exceeded, that of Whites.⁵⁴

From the 1950s, when union membership peaked, through the early 1990s, union membership decreased dramatically.⁵⁵ In 1954, 35% of American workers belonged to unions.⁵⁶ While this percentage fell over time, the total number of union members increased from 17 million in 1954 to 20.2 million in 1978.⁵⁷ But, by 1983, membership decreased to

45. See *id.* (noting that unequal bargaining power lowers wage rates and hinders the commerce flow).

46. Champion, *supra* note 20, at 186.

47. See generally *id.* at 187 (explaining the American workers' transformation into a strong and unified voice).

48. See DESLIPPE, *supra* note 18, at 114 (discussing that women challenging collective bargaining agreements allowed for better opportunities for wages and maternity leave).

49. *Id.* at 114. During World War II, America depended on women to sustain the workforce. *Id.* Once the postwar reconstruction began, women like Olga Madar were laid off from their jobs. *Id.* The 1950s proved to be the decade in which women unionists began their struggle to be included in the labor movement. *Id.* Despite union opposition, Madar and other women unionists helped pass the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 that included a clause prohibiting sex discrimination. *Id.*

50. See AFL-CIO, UNION DIFFERENCE: UNIONS ARE IMPORTANT FOR WOMEN, available at <http://www.aflcio.org/uniondifference/uniondiff13.htm> [hereinafter AFL-CIO, WOMEN] (last visited Feb. 12, 2002).

51. See *id.*

52. See *id.*

53. See *id.*

54. See *id.* (finding that white men's unionization rate is at 15%, while white women's is at 11%).

55. See AFL-CIO, UNION DIFFERENCE: UNION MEMBERSHIP TRENDS, available at <http://www.aflcio.org/uniondifference/uniondiff11.htm> [hereinafter AFL-CIO, MEMBERSHIP] (last visited Feb. 25, 2002).

56. See *id.*

57. See *id.*

17.7 million members, or 20.1% of the work force.⁵⁸ At the beginning of the 1990s, union membership dropped to only 16% of the American work force.⁵⁹ By 1996, union members represented 13% of nonagricultural workers in the United States.⁶⁰ In 2001, 13.5% of the American workforce, or 16.3 million workers, was unionized.⁶¹

By the time Congress enacted NAFTA in 1994, union membership began a steady decline.⁶² This was due in part to a decreased emphasis on grass-roots union organizing, and unions becoming comfortable with their perceived political and social influence.⁶³ Although internal problems were important, the increase in the number of international trade agreements, specifically NAFTA, has played a role in decreasing union membership.⁶⁴ Trade agreements like NAFTA have given employers bargaining power to threaten plant closures and make employees apprehensive about joining unions.⁶⁵ These threats were only one of the many concerns held by NAFTA opponents, and a reason that the North American Agreement on Labor Cooperation (NAALC) was created.⁶⁶ Both NAFTA supporters and opponents had varying expectations of the treaty. The next section explores the passage of NAFTA and its effect on American workers from both perspectives.

III. LEADING UP TO NAFTA AND FTAA

A. *International Agreements Leading to NAFTA*

The United States entered into other trade agreements that served to some extent as precursors to NAFTA and its eventual successor, FTAA.⁶⁷

58. *See id.*

59. *See* Champion, *supra* note 20, at 186.

60. *See id.* at 187.

61. *See* AFL-CIO, MEMBERSHIP, *supra* note 55.

62. *See* Champion, *supra* note 20, at 186 (stating that by 1991 union membership decreased to 16%); *see also* Murphy, *Present and Future*, *supra* note 3, at 403 (supporting that Congress enacted NAFTA on January 1, 1994).

63. Bruce Raynor, Inaugural Address to the Union of Needletrades, Industrial, and Textile Employees, AFL-CIO (UNITE) (July 2001).

64. *See* Spracker & Mertz, *supra* note 17, at 742-43 (reporting that because of NAFTA union membership has declined and may continue to decline).

65. *See* BRONFENBRENER, *supra* note 25, at 28 (reporting that employees fear unionizing because of plant closure threats).

66. *See* Murphy, *Present and Future*, *supra* note 3, at 405. Congress included a provision in NAFTA stating that NAFTA would only go into effect once Canada, Mexico, and the United States signed the NAALC. *Id.* The three countries signed the agreement to settle concerns regarding internationally recognized worker rights. *Id.*

67. *See generally* Matthew Schaefer, *Searching for Pareto Gains in the Relationship Between Free Trade and Federalism: Revisiting the NAFTA, Eyeing the FTAA*, 23 CAN.-U.S. L.J. 441, 450-54 (1997).

These agreements are important because they provide the background and basis for the creation of NAFTA.⁶⁸ Also, international agreements between other Western Hemisphere countries, such as MERCOSUR and the Andean Pact, are pertinent because they will be germane in the formation of FTAA from a non-United States perspective.⁶⁹ Together, the various trade agreements from the entirety of the Americas will play a significant role in the formation of the FTAA.⁷⁰

Historically, agreements between different countries focused on peace and security.⁷¹ In time, foreign affairs were linked with domestic affairs.⁷² In 1919, international discussions led to the establishment of the International Labor Organization (ILO), which in the 1950s negotiated agreements for human rights.⁷³ The ILO led to the creation of the General Agreement on Tariffs and Trade (GATT) in 1947.⁷⁴

The GATT led the way for world trade for almost fifty years.⁷⁵ Subsequent negotiating rounds to GATT followed, and the seventh GATT round, known as the Tokyo Round of 1979, focused on non-tariff barriers.⁷⁶ The Uruguay Round of the GATT was approved in 1994, and culminated in the creation of the World Trade Organization.⁷⁷

During the period that the United States was negotiating trade obligations under the GATT's Uruguay Round, it also began considering the expansion of its free trade agreement with its largest trading partner, Canada.⁷⁸ NAFTA is the result of incorporating Mexico into the previously

68. See generally *id.*

69. See *id.* at 444.

70. See *id.*

71. See *id.* at 449.

72. *Id.*

73. *Id.* at 450.

74. The ILO was created as part of the Treaty of Versailles. See Christopher R. Coxson, Comment, *The 1998 ILO Declaration on Fundamental Principles and Rights at Work: Promoting Labor Law Reforms Through the ILO as an Alternative to Imposing Coercive Trade Sanctions*, 17 DICK. J. INT'L L. 469, 469-70 n.5 (1999). In 1946, it became part of the United Nations. *Id.* See also Jay M. Vogelsson, *International Labor Organization, Report of the ABA Section on International Law and Practice*, 30 INT'L L. 653, 654-63 (1996).

75. Schaefer, *supra* note 67, at 450.

76. *Id.*

77. See, e.g., Frederick W. Mayer, *Labor, Environment, and the State of U.S. Trade Politics*, 6 NAFTA: L. & BUS. REV. AM. 335 (2000); Coxson, *supra* note 74.

78. See Schaefer, *supra* note 67, at 451. Cf. JAMES MACGREGOR BURNS & GEORGIA J. SORENSON, DEAD CENTER: CLINTON-GORE LEADERSHIP AND THE PERILS OF MODERATION 194 (1999) (stating that Canada is the United State's largest trading partner, and NAFTA was designed to expand on the free trade agreement existing between the United States and Canada since January 1, 1989).

established Canada-United States Free Trade Agreement (CUSFTA).⁷⁹ President Ronald Reagan proposed CUSFTA in 1985 to Canadian Prime Minister Brian Mulroney in an effort to end all tariffs and trade barriers existing between the countries within a ten-year period.⁸⁰ CUSFTA went into effect on January 1, 1989.⁸¹ In January 1991, negotiations began to expand CUSFTA to include Mexico.⁸² These negotiations eventually led to NAFTA.

B. *Other Free-Trade Pacts of the Western Hemisphere*

Although NAFTA has been suggested as the model for FTAA, there are other free trade agreements in the Western Hemisphere which also may come into play during FTAA negotiations.⁸³ By 1995, there were twenty-three free trade pacts between the thirty-four democracies of the Western Hemisphere.⁸⁴ The more prominent agreements are: NAFTA, MERCOSUR, the Andean Pact, the Central American Common Market (CACM), the Group of Three, and the Caribbean Community (CARICOM).⁸⁵ These agreements are all important because FTAA will have to integrate NAFTA and these other free trade pacts.⁸⁶ Therefore, as is the case in the NAFTA context, established workers' rights and labor standards will be a major concern to every nation involved in FTAA.⁸⁷ The following is an overview of the major trade agreements existing today in the Western Hemisphere.

79. See, e.g., Favillo-Solano, *supra* note 3; Ruth Agather & Timothy N. Tuggery, *The Meat and Potatoes of the North American Free Trade Agreement*, 24 ST. MARY'S L. J. 829, 831 (1993). See also NAFTA, *supra* note 1.

80. Sheila M. Raftery, Comment, *Safety Net and Measuring Rod: The North American Free Trade Agreement Transitional Adjustment Assistance Program*, 12 TEMP. INT'L & COMP. L.J. 159, 161 (1998). See also EDWARD S. KAPLAN, AMERICAN TRADE POLICY, 137 (1996).

81. Schaefer, *supra* note 67, at 449.

82. Raftery, *supra* note 80, at 162.

83. See Carol Stump, Comment, *Free Trade Area of the Americas (FTAA)*, 4 J. INT'L L. & PRAC. 153, 154 (1995).

84. See *id.* at 155.

85. See *id.*

86. See *id.* at 155-56.

87. The Republican Congressional leaders, allied with the business community, are now attempting to exclude labor and environmental standards in the proposed FTAA in order to better negotiate with countries that do not insist on higher standards. See Frederick W. Mayer, *Labor, Environment, and the State of U.S. Trade Politics*, 6 NAFTA: L. & BUS. REV. AM. 335, 336 (2000). Many developing countries view the U.S. requirements of social regulations as potentially depressing their economic growth and encroaching upon their national sovereignty. *Id.*

1. MERCOSUR

The Southern Cone Common Market (MERCOSUR), enacted in 1994, is a trade agreement between Argentina, Brazil, Paraguay, and Uruguay.⁸⁸ The union of these countries comprises a gross domestic product (GDP) of nearly \$1 trillion and encompasses some 200 million consumers.⁸⁹ In 1996, the MERCOSUR member-states and Chile entered into a free trade agreement, making Chile an associate-member to the customs union.⁹⁰ Furthermore, MERCOSUR has discussed efforts to merge with the five countries that comprise the Andean Pact.⁹¹

MERCOSUR provides for the free disbursement of goods, services, labor and capital in its member countries.⁹² MERCOSUR is more comprehensive than NAFTA because it adds a customs union to the free trade agreement that coordinates a common external tariff policy.⁹³

Although MERCOSUR does not include the United States, Mexico, or Canada, this trade agreement is a powerful trading bloc in South America and the Western Hemisphere.⁹⁴ Commentators have noted that "it would be a mistake for North Americans to underestimate the power of MERCOSUR."⁹⁵ This customs union is important because its member-states are likely members of FTAA.⁹⁶ The members of NAFTA will have to negotiate with MERCOSUR's member-states and agree on a trade pact that is suitable for the entire Western Hemisphere.⁹⁷

88. Lopez, *supra* note 32, at 5.

89. *Id.*

90. *See id.*; see also Hunter R. Clark & Amanda Velazquez, *Foreign Direct Investment in Latin America: Nicaragua – A Case Study*, 16 AM. U. INT'L L. REV. 743, 751 (2001) (including Bolivia and Chile as associate members of MERCOSUR).

91. *See* Lopez, *supra* note 32, at 5; see also Clark & Velazquez, *supra* note 90, at 751.

92. Treaty Establishing a Common Market (MERCOSUR), Mar. 26, 1991, 30 I.L.M. 1041 (1991).

93. *See* Frank J. Garcia, "Americas Agreements" – *An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT'L L. 63, 75 (1997) (outlining the major trade agreements in North America, South America and the Caribbean). *See also* Kenneth W. Abbott & Gregory W. Bowman, *Economic Integration in the Americas: "A Work in Progress"*, 14 NW. J. INT'L L. & BUS. 493 (1994) (critiquing the NAFTA model of expansion).

94. Lopez, *supra* note 32, at 5.

95. *Id.*

96. *See id.*

97. *See id.*

2. The Andean Pact

The Treaty of Cartagena created the Andean Pact.⁹⁸ Established in 1969 as a measure to compete with the traditional trading powers of Mexico, Brazil, and Argentina, its founding parties included Bolivia, Chile, Columbia, Ecuador, and Peru.⁹⁹ Today, the Pact includes Bolivia, Colombia, Ecuador, and Venezuela.¹⁰⁰ The Andean Pact works to harmonize specific areas within the member nations, particularly foreign capital and technology transfer rules.¹⁰¹ Additionally, and unlike NAFTA, the Andean Pact intended to limit the presence of multi-national corporations (MNCs) in the region by applying strict regulations and obligations.¹⁰²

3. The Central American Common Market (CACM)¹⁰³

Currently, the Central American Common Market (CACM) encompasses El Salvador, Costa Rica, and Honduras.¹⁰⁴ CACM was the earliest Latin American regional trade agreement.¹⁰⁵ It was established, in part, to combat great poverty in economies that were largely agricultural.¹⁰⁶

Unfortunately, the extreme local and regional strife in Central America during the 1970s and 1980s led to a derailment of CACM.¹⁰⁷

98. Treaty of Cartagena, Agreement on Sub-regional Integration, May 26, 1969, 2 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 597 (Stephen Zamora & Ronald A. Brand eds., 1990).

99. See JOSEPH GRUNWALD ET AL., LATIN AMERICAN ECONOMIC INTERGRATION AND U.S. POLICY 56 (1972) (detailing the motivations in creating the Andean pact).

100. In 1973, Venezuela joined the Andean Pact and Chile left in 1976. See Garcia, *supra* note 93, at 76 n.58. Peru declined membership to the Pact in 1992 but initiated involvement with Pact members through bilateral agreements. *Id.*

101. See *id.* at 76. See generally, Abbott & Bowman, *supra* note 93 (detailing the motivations in creating the Andean Pact).

102. Ultimately, limiting foreign investment failed in the Andean Pact. See Garcia, *supra* note 93, at 76 n.61.

103. Treaty of Managua, General Treaty on Central American Economic Integration, Dec. 13, 1960, 2 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 529 (Stephen Zamora & Ronald A. Brand eds., 1990).

104. Nicaragua was a founding member of CACM, but later withdrew. See, e.g., Garcia, *supra* note 93, at 77; Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT'L L. J. 127, 128 (1995).

105. See Garcia, *supra* note 93, at 77.

106. *Id.* The agreement created by CACM has been described as an experiment because of the circumstances it was created under, including "extreme local strife, great poverty, and largely agricultural economies." *Id.* See also GRUNWALD ET AL., *supra* note 99, at 42 (detailing motivations in creating CACM).

107. Garcia, *supra* note 93, at 77. See generally Abbott & Bowman, *supra* note 93, at 504.

However, by 1991, the CACM nations had recommitted to trade efforts, and in 1993 entered into a new trade pact to establish a new CACM.¹⁰⁸

4. The Group of Three (G-3)¹⁰⁹

The Group of Three (G-3) includes Mexico, Venezuela, and Columbia.¹¹⁰ These countries began the implementation process of a free trade zone in 1993.¹¹¹ The G-3 free trade agreement covers market access, intellectual property, and investments.¹¹² The G-3 members anticipated acceding to other regional trade agreements and designed their FTA so that linking to other agreements like FTAA is possible.¹¹³ For example, Columbia and Venezuela are also part of the Andean Pact and are subject to overlapping commitments, an issue which will also challenge most FTAA members.¹¹⁴

5. The Caribbean Community (CARICOM)¹¹⁵

CARICOM, established in 1973, currently includes the thirteen English-speaking countries of the Caribbean.¹¹⁶ CARICOM has three main integration goals: economic integration, regional cooperation, and coordination of foreign policy.¹¹⁷ The CARICOM economies have experienced growth since the late 1980s.¹¹⁸

6. SUMMARY

The thirty-four democracies of the Western Hemisphere have been establishing trade agreements between each other for decades. NAFTA, MERCOSUR, the Andean Pact, CACM, the Group of Three, and CARICOM will all serve as precursors to what will become a free trade agree-

108. See Garcia, *supra* note 93, at 77-78. There were also discussions to include Costa Rica and speculation that the new CACM could merge with G-3. See *id.*

109. Grupo de los Tres (G-3), June 13, 1994, 197 Integracion Latinoamericana 41 (1994).

110. See Garcia, *supra* note 93, at 73.

111. See, e.g., Mexico, Venezuela, Colombia Ready to Sign G-3 Trade Pact, 10 INT'L TRADE REP. (BNA) 2053 (1993) [hereinafter *Trade Pact*]; Garcia, *supra* note 93, at 73.

112. See, e.g., *Trade Pact*, *supra* note 111; Garcia, *supra* note 93, at 74.

113. See, e.g., *Trade Pact*, *supra* note 111; Garcia, *supra* note 93, at 74.

114. See Garcia, *supra* note 93, at 74.

115. CARICOM replaces the more limited Caribbean Free Trade Association that was created in 1965. See Treaty Establishing the Caribbean Community (CARICOM), July 4, 1973, 2 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 660 (Stephen Zamora & Ronald A. Brand eds., 1990).

116. See, e.g., Richard Bernal, *Regional Trade Agreements in the Western Hemisphere*, 8 AM. U. J. INT'L L. & POL'Y 683, 703 (1993); Garcia, *supra* note 93, at 78.

117. See Garcia, *supra* note 93, at 78.

118. See *id.*

ment for the Americas. These established trade pacts will have to be integrated into any new agreement.

The integration factor is relevant because of the need to incorporate workers rights and labor standards into the FTAA. Of the numerous agreements established through the Americas, NAFTA is the only agreement that includes labor and environmental standards in its document.¹¹⁹ Although all of the American countries have not previously required workers' rights standards in their regional agreements, the FTAA should have such standards.

IV. THE EXPECTATIONS OF NAFTA AND THE REALIZATION OF THOSE EXPECTATIONS

A. *Expectations of Those Supporting NAFTA*

In addition to generating more jobs in the United States, NAFTA will lead to better jobs. Trade expression typically results in increased wages and higher skilled jobs, of which the livelihood of the American work force depends. Missing the boat on NAFTA will prevent us from reaping these potential gains.¹²⁰

Proponents of NAFTA emphasized that it will stimulate long-term economic development in Canada, Mexico, and the United States.¹²¹ For instance, while the United States gains investment and employment opportunities, Mexico benefits from increased technology and industrialization.¹²² Supporters further argued that NAFTA was part of an inevitable trend of a more globalized workforce.¹²³

Importantly, these gains were expected to decrease illegal immigration from Mexico into the United States.¹²⁴ Illegal immigration would decrease, proponents argued, because NAFTA was supposed to create jobs and increase wages in Mexico, by providing an incentive for Mexicans to

119. See *id.* at 72.

120. *Labor, Business, Agriculture, and Environmental Issues Relating to NAFTA: Hearings Before the Senate Comm. on Finance*, 103rd Cong. 58 (1993) (quoting Robert B. Reich, Secretary of the U.S. Department of Labor).

121. Barr et. al., *supra* note 8, at 2.

122. See generally James E. Bailey, *Free Trade and the Environment - Can NAFTA Reconcile the Irreconcilable?*, 8 AM. U. J. INT'L L. & POL'Y 839, 843 (1993). See also Barr et. al., *supra* note 8, at 3.

123. See Roger W. Wallace & Max Scoular, *The North American Free Trade Agreement and United States Employment*, 24 ST. MARY'S L.J. 945, 948 (1993) (explaining how the United States believed that NAFTA was needed to compete in an expanding global economy).

124. See Barr et. al., *supra* note 8, at 3; see also Weintraub, *supra* note 7, at 309 (writing that of the estimated six million undocumented aliens in the United States, the majority are Mexican).

stay in their native country.¹²⁵ In addition, Mexican citizens were expected to be able to buy American products with their increased wages and better jobs, and therefore further augment the economy of the United States.¹²⁶

NAFTA's supporters were eager to negotiate the agreement, which led Congress to authorize fast-track¹²⁷ consideration, allowing debate of the bill but forbidding amendments.¹²⁸ Not only was NAFTA expected to promote the economies of the three nations, it was also going to promote labor¹²⁹ and environmental standards.¹³⁰ NAALC addresses the labor standards of NAFTA.

NAALC requires each NAFTA member to abide by eleven labor principles.¹³¹ The principles include:

1. Freedom of association and protection of the right to organize;
2. The right to bargain collectively;
3. The right to strike;
4. The prohibition of forced labor;
5. Labor protections for children and young persons;
6. Minimum employment standards;
7. Elimination of employment discrimination;
8. Equal pay for women and men;
9. Prevention of occupational injuries and illnesses;
10. Compensation in cases of occupational injuries and illnesses;
and,
11. Protection of migrant workers.¹³²

125. See Favillo-Solano, *supra* note 3, at 294-95, 297.

126. See *id.* at 297.

127. Fast-track authority is discussed in depth in a later section of this comment, but for a general discussion of fast-track see Jack I. Garvey, *A New Evolution for Fast-Tracking Trade Agreements: Managing Environmental and Labor Standards Through Extraterritorial Regulation*, 5 UCLA J. INT'L L. & FOREIGN AFF. 1, 7 (2000).

128. See Weintraub, *supra* note 7, at 565; see also AFL-CIO, *FAST-TRACK: IT'S BACK* (2001) [hereinafter *AFL-CIO, FAST-TRACK*] (criticizing Congressional leaders and President George W. Bush for attempting to push fast track legislation in order to move the Free Trade Area of the Americas (FTAA) agreement through Congress quickly), available at <http://www.aflcio.org/globaleconomy/index.htm> (last visited Feb. 18, 2002).

129. NAALC, *supra* note 2.

130. See North American Agreement on Environmental Cooperation, Sept. 13, 1993, 32 I.L.M. 1480 (1993) [hereinafter *NAAEC*]. See generally Mayer, *supra* note 87, at 336 (discussing how the American labor and environmental movements have combined forces to oppose NAFTA).

131. NAALC, *supra* note 2, at 1513-14.

132. *Id.* at 1499.

NAALC's expressed purpose is to safeguard workers' rights in Canada, Mexico and the United States.¹³³ The labor agreement requires each country to enforce domestic labor laws, establish a commission to promote collaboration, and resolve labor disputes.¹³⁴

B. *Expectations of Those Opposing NAFTA*

"American workers will soon hear a giant sucking sound of jobs being pulled out of this country."¹³⁵

The American labor movement, as well as other interest groups,¹³⁶ are concerned with the potential impact NAFTA could have on American workers.¹³⁷ Unions predicted that management would use threats of relocation as a bargaining chip to decrease wages and benefits.¹³⁸ The fear was that lower wages and the relaxed enforcement of labor standards in Mexico would give manufacturers an incentive to set up more *maquiladoras*¹³⁹ in Mexico, suppressing the job market in the United States.¹⁴⁰ *Maquiladoras* have an added edge over American labor because Mexico's work-week is forty-eight hours per week, and can be increased to sixty hours per week without overtime pay.¹⁴¹

133. *Id.* at 1502 (stating in the Preamble that each country has an obligation to promote employment gains and higher living standards, and also respect labor laws).

134. Favilla-Solano, *supra* note 3, at 295.

135. See Andrew K. Stutzman, *Our Eroding Industrial Base: U.S. Labor Laws Compared with Labor Laws of Less Developed Nations in Light of the Global Economy*, 12 DICK. J. INT'L L. 135, 166 n.263 (1992) (citing Mike Robinson, *Perot Urges Defeat of Mexican Trade Pact*, PHILA. INQ., Oct. 20, 1992, at A17 (quoting 1992 Independent Presidential Candidate Ross Perot)).

136. Labor unions have been involved in trade issues for some time, but recently, environmental groups, human-rights organizations, and other activists have joined the opposition to globalization. See Mayer, *supra* note 87, at 336.

137. See, e.g., BRONFENBRENNER, *supra* note 25, at 6; Mayer, *supra* note 87, at 339; Stump, *supra* note 83, at 158.

138. Favilla-Solano, *supra* note 3, at 300.

139. Generally, the term "*maquiladora*" refers to sizeable foreign-owned factories in Mexico that perform final assembly work on parts imported from other countries. See Nicole Grimm, *The North American Agreement on Labor Cooperation and its Effects on Women Working in Mexican Maquiladoras*, 48 AM. U. L. REV. 179, 181 n.11 (1998) (citing Sherri M. Durand, *American Maquiladoras: Are They Exploiting Mexico's Working Poor?* 128, 129 (1994)). The finished product is then returned back to the parts' nation of origin for sale, thus taking advantage of cheap Mexican labor. See *id.*

140. See generally Lance Compa, *Labor Rights and Labor Standards in International Trade*, 25 LAW & POL'Y INT'L BUS. 165 (1993).

141. *Federal Job Movement Data and the Implications for NAFTA: Hearings Before the Subcomm. on Oversight of Gov't Mgmt. of the Comm. on Gov't Affairs U.S. S.*, 103rd Cong. 103-104 (1993) (statement of Tom Fairfax).

At the time NAFTA negotiations were taking place, the Mexican minimum wage was 58 cents per hour, while the United States minimum wage was \$4.25 per hour.¹⁴² American workers expected to lose a significant amount of their jobs to Mexico if NAFTA was enacted due to this great disparity in wages.¹⁴³ A company could easily view United States labor standards as problematic and shift operations to Mexico where the industry climate is more "sympathetic" to business (i.e. less regulation, cheaper labor, and ineffective unions).¹⁴⁴ These incentives to move to Mexico are what many commentators have termed "industrial flight" or the "race to the bottom."¹⁴⁵

C. Realization of the Expectations

While supporters of NAFTA in the United States looked forward to economic development and increased competitiveness, opponents anticipated job migration to Mexico and deterioration in labor standards.¹⁴⁶ It has been over seven years since NAFTA and NAALC were enacted, enough time to gauge whose expectations may have been realized.

1. Proponents' Viewpoint

Those who view increased trade, like that created by NAFTA, as a source of job security in the United States focus on the increase of exports as particularly important.¹⁴⁷ In the simplest of terms, exports create jobs, while imports take jobs away.¹⁴⁸ Between 1993 and 1997, United States exports to Mexico grew 69% to total \$71 billion.¹⁴⁹ Accordingly,

142. Robert B. Cohen & Clyde V. Prestowitz, Jr., *Outlook*, WASH. POST, Apr. 15, 1996, at 1C.

143. See Parks, *supra* note 33, at 17.

144. See Eugene Robinson, *East and West: A Gloomy Economic Forecast*, WASH. POST, Apr. 12, 1993, at A1.

145. Justice Louis Brandeis has been credited with coining the phrase "race to the bottom," which is often mentioned in the context of globalization. See William J. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L. J. 663, 664 (1974) (discussing *Liggett Co. v. Lee*, 288 U.S. 517, 559 (1933) (Brandeis, J., dissenting) in which Brandeis stated that "the race was one not of diligence but of laxity"); see also Matthew W. Finkin, *International Governance and Domestic Convergence in Labor Law as Seen from the American Midwest*, 76 IND. L.J. 143, 164 (2001).

146. See generally Mayer, *supra* note 87, at 340; BRONFENBRENNER, *supra* note 25, at 5.

147. ROBERT E. SCOTT, THE FACTS ABOUT TRADE AND JOB CREATION: ISSUE BRIEF #139, available at <http://www.epinet.org> (last visited Apr. 3, 2002).

148. *Id.*

149. INT'L TRADE ADMINISTRATION, U.S. Dep't of Commerce, Exports to Mexico, [hereinafter Exports to Mexico] available at <http://www.ita.doc.gov>.

Mexico receives the most foreign direct investment (FDI)¹⁵⁰ of any country in the world.¹⁵¹

The State of Texas best serves NAFTA proponent's arguments that the treaty is beneficial to the United States. Arguably, Texas has benefited more than any other state.¹⁵² By 1997, exports from Texas to Mexico had grown by 21%.¹⁵³ The U.S. Department of Commerce has determined that 378,000 jobs in Texas are based on Mexican exports.¹⁵⁴ Notably, San Antonio, Texas, with its close location to Monterrey, Mexico, is becoming a distribution hub and service provider to Northern Mexico.¹⁵⁵ Major law and accounting firms are establishing offices in San Antonio in an attempt to attract clients interested in the Mexican market.¹⁵⁶ In addition, the North American Development Bank (NADBank), a component of the entire NAFTA package, is located in San Antonio.¹⁵⁷

D. Broken Promises

1. Opponents' Viewpoint

In sharp contrast to NAFTA's long-time supporters, many have concluded that NAFTA has created more problems than it has eliminated. Unfortunately, while NAFTA's text suggests that it promotes basic labor principles, this is only an aspiration, instead of a required obligation.¹⁵⁸

150. The phrase "foreign direct investment" refers to investment in a firm of one nation by multinational corporations based in another nation. See BRONFENBRENNER, *supra* note 25, at 5 n.1. See generally, Clark & Velazquez, *supra* note 90, at 749 (discussing foreign direct investment in general as well as using Nicaragua as a case study to detail the impact of FDI in Latin American countries).

151. Weinstein, *supra* note 3, at 110 (recognizing that Mexico's participation in NAFTA has been beneficial for that country). From 1988 to 1994, American FDI grew annually by a multiple of six, reaching \$12 billion. See, e.g., Clark & Velazquez, *supra* note 90, at 749. The United States' FDI reached approximately \$14.3 billion by 1998. *Id.* By 1999, Latin America and the Caribbean received \$97 billion in investments from abroad. *Id.* This amount exceeded that of Asia, something that had not happened in thirteen years. *Id.* See also Matt Moffett, *Latin America Tops Asia in Luring Foreign Investors*, WALL ST. J., Feb. 22, 2000, at A21.

152. Weinstein, *supra* note 3, at 110.

153. EXPORTS TO MEXICO, *supra* note 149.

154. Weinstein, *supra* note 3, at 110 (finding that Texas has about three and one-half times the number of Mexican export related jobs than California).

155. Dan McGraw, *Happily Ever NAFTA?*, U.S. NEWS & WORLD REP., Oct. 28, 1996, at 46, 48.

156. *Id.*

157. North American Development Bank, *General Overview*, at http://www.nadbank.org/English/general/general_main.htm (last visited Apr. 4, 2002).

158. See Finkin, *supra* note 145, at 148; see also Clyde Summers, *NAFTA's Labor Side Agreement and International Labor Standards*, 3 J. SMALL & EMERGING BUS. L. 173, 179,

The trade deficit, the ineptitude of NAALC, and job losses in various industries are major concerns.

While NAFTA supporters have pointed to increased exports, opponents have insisted that the United States trade deficit with Mexico and Canada are instead the keys to evaluate the agreement's success or failure.¹⁵⁹

Looking at exports while ignoring the effects of imports is like trying to keep score in a baseball game by adding up the runs scored by one team and ignoring those scored by the other. In this case, the score, i.e., the trade balance, is the difference between exports (which create jobs) and imports (which destroy them). If imports increase more rapidly than exports, as they have in this economic expansion, the net effect will be to reduce growth and employment.¹⁶⁰

According to a poll of Americans in 1993, unemployment, the federal deficit, and taxes were the most important economic issues facing the United States.¹⁶¹ However, by 1998, for the first time ever, Americans said that the United States trade deficit was the most important economic issue facing the country.¹⁶²

Actual trade deficit issues, as well as American concern with the trade deficit, are relevant to union organizing drives. American workers realize that jobs and the trade deficit are interrelated, as evident in the poll results.¹⁶³ This effects union organizing drives because workers relate the trade deficit to their job security.¹⁶⁴

186 (1999) (noting that NAALC only requires the member countries to observe and enforce its own laws).

159. See SCOTT, *supra* note 147.

160. See *id.* See also BRONFENBRENNER, *supra* note 25, at 6.

161. See BRONFENBRENNER, *supra* note 25, at 7.

162. See *id.*

163. See *id.* at 7. As American corporations continue to migrate around the globe in search of cheaper labor, American workers have begun to realize that their job security is determined, in part, by the trade deficit. This concern is reflected in the 1998 poll, wherein a greater percent of Americans now consider the trade deficit to be the most important economic issue facing the country. See also ROBERT E. SCOTT, NAFTA'S PAIN DEEPENS, available at <http://www.epinet.org/uniondifference/uniondiff11.htm> (stating that "if current trends continue, the U.S. trade deficit attributable to NAFTA is likely to double in 1999, leading to a rapid increase in the numbers of jobs lost").

164. See BRONFENBRENNER, *supra* note 25, at 12 (suggesting that due to the post-NAFTA climate, plant closing threats during union organizing drives have increased in the last five years); Rachel Li Wai Sven, *You Sure Know How to Pick 'Em: Human Rights and Migrant Farm Workers in Canada*, 15 GEO. IMMIGR. L.J. 199 (2000) (discussing the shortcomings in NAALC); Sheryl Dickey, *The Free Trade of the Americas and Human Rights Concern*, 8 HUM. RTS. BRIEF 26 (2001) (stating how NAALC lacks enforceable remedies).

The second major concern with NAFTA is the NAALC's lack of effectiveness.¹⁶⁵ The common sentiment among labor advocates is that NAALC fails to provide safeguards for workers, evidenced in the lack of the ability to secure sanctions against employers.¹⁶⁶ NAALC clearly emphasizes improving labor standards, living conditions, and workers' rights.¹⁶⁷ These initiatives are important to workers around the world, and in the United States, these provisions are especially important to minorities and women.¹⁶⁸

The first two complaints under NAALC were filed separately on February 14, 1994, against Honeywell and General Electric.¹⁶⁹ Neither company was found to have violated any of the NAALC provisions.¹⁷⁰ Interestingly, by April 2001, there had been 23 complaints filed under NAALC, but not one has resulted in any sanctions for labor rights violations.¹⁷¹

Finally, NAFTA opponents cite enormous job losses as a ramification of NAFTA. At the most extreme end, one report indicates that by 1999 all fifty states and the District of Columbia had suffered approximately 440,000 job losses due to NAFTA imports.¹⁷²

One key source in identifying the job losses directly associated with NAFTA is the NAFTA Transitional Adjustment Assistance Program (NAFTA-TAA).¹⁷³ NAFTA-TAA acts as a welfare program, to help

165. See Adams & Singh, *supra* note 23, 162 (explaining that trade unionists and friends of organized labor called the agreement a sham, and the AFL-CIO characterized the NAALC as representing a weakening of remedies available under U.S. law); see also Human Rights Watch, *NAFTA Labor Accord Ineffective: Future Trade Pacts Must Avoid Pitfalls*, available at <http://www.hrw.org/press/2001/04/nafta0416.htm> (last visited Feb. 12, 2002).

166. See Allen R. Myerson, *U.S. Backs Mexico Law, Vexing Labor*, N.Y. Times, Oct. 13, 1994, at D1 available at 1991 WL 2081503; see also C. O'Neal Taylor, *Fast-track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 65 (1994).

167. NAALC, *supra* note 2, at 1502-03. The preamble of NAALC states that the intent of the agreement is to improve worker's rights, living conditions, and improve working conditions. See *id.*

168. See Champion, *supra* note 20, at 226-27 (noting the NAALC's objectives to include "equal pay regardless of gender" and the "protection of migrant workers").

169. Adams & Singh, *supra* note 23, at 168.

170. *Id.* at 168-170.

171. *NAFTA Labor Accord Ineffective*, *supra* note 165 (noting that alleged violators include General Electric, Honeywell, Sony, General Motors, McDonald's, Sprint, and the Washington State apple industry)

172. See SCOTT, *supra* note 147.

173. See 19 U.S.C. § 2331 (1998) (allowing the U.S. Department of Labor to administer NAFTA-TAA).

manufacturing workers whose unemployment is directly or indirectly¹⁷⁴ related to NAFTA.¹⁷⁵ In 1996, 94,161 displaced workers received NAFTA-TAA benefits.¹⁷⁶ By July 2001, 355,992 workers had been certified to receive aid through NAFTA-TAA.¹⁷⁷ Notably, Texas has the most certified workers of any other state with 33,919.¹⁷⁸

However, NAFTA-TAA does not reveal the whole picture of NAFTA-related job losses. This is because some displaced workers fail to apply for the program, because they do not even realize their job loss was caused by NAFTA, and/or they simply use traditional unemployment programs.¹⁷⁹ Undoubtedly, job losses due to NAFTA are difficult to calculate, but it is a consensus that certain industries, like manufacturing, are more adversely affected than others.¹⁸⁰

Job losses in the manufacturing industry are the most alarming. While women make up 35% of the manufacturing industry, Blacks and Latinos account for 9% and 6% of the industry.¹⁸¹ This is significant because women, Blacks, and Latinos account for 51% of NAFTA job losses, almost exactly corresponding with their representation in the manufactur-

174. Unfortunately, NAFTA-TAA only applies to manufacturing jobs, so non-manufacturing jobs lost from decreased exports or increased imports are not accounted for. See Raftery, *supra* note 80, at 180-82. Another example of a business not being covered by NAFTA-TAA, is a coffee shop that is across the street from a plant. See *id.* If the plant closes down because of NAFTA regulations, then the coffee shop owner is not covered under NAFTA-TAA because it does not produce a manufacturable product. See *id.*

175. *Id.* at 160 (explaining how the Transitional Adjustment Assistance Program works to ameliorate the negative impact of NAFTA on United States workers).

176. *Id.* at 180 (noting the number of petitions offered by Transitional Adjustment Assistance Program benefits).

177. PUBLIC CITIZEN, A SAMPLING OF NAFTA RELATED JOB LOSS: NAFTA-TAA (2001) [hereinafter Public Citizen, SAMPLING] (noting the increase in workers to receive assistance) available at <http://www.citizen.org/pctrade/taa97acs/KEYTAA.html> (Mar. 3, 2002).

178. PUBLIC CITIZEN, NAFTA-TAA: STATE TOTALS (2001) [hereinafter PUBLIC CITIZEN, TOTALS] (reporting the individual state totals of workers receiving assistance from the Transitional Adjustment Assistance Program) available at <http://www.citizen.org/pctrade/taa97acs/naftataa.html> (last visited Mar. 3, 2002).

179. See Raftery, *supra* note 80, at 182; see also Lusane, *supra* note 16, at 440-441 (explaining that even some workers who know about the Transitional Adjustment Assistance program have more success obtaining relief from state or federal programs).

180. See Raftery, *supra* note 80, at 182 (noting that NAFTA-TAA was created to deal with the expected manufacturing sector job losses); see also Lusane, *supra* note 16, at 440-441 (identifying NAFTA-TAA as the mechanism created to address NAFTA job losses because "even its supporters understood that a significant number of jobs would be lost").

181. See Jesse Rothstein & Robert E. Scott, NAFTA's Casualties: Employment Effects on Men, Women, and Minorities: Issue Brief #120, available at <http://www.epinet.org/Issuebriefs/ib120.html> (last visited Mar. 8, 2002).

ing industry.¹⁸² According to the U.S. Department of Commerce, in 1999 alone, a total of 341,000 manufacturing jobs were lost in the United States.¹⁸³ In 1998, manufacturing workers were the largest percentage of displaced workers at 27%.¹⁸⁴

The statistics regarding blacks, other minorities, and the manufacturing industry lead directly to the issue discussed in this comment. The purpose of this comment is to address a fourth significant problem with NAFTA—its effect on union organizing drives and the subsequent impact on the minority community. It is not uncommon in the United States for neutral laws to produce a negative outcome that discriminates based on race or gender.¹⁸⁵

V. THE PROBLEM

NAFTA has created some substantial problems that must be reviewed before a trade agreement is established encompassing the Western Hemisphere.

A. *Job Insecurity*

“Not just greater mobility, but the threat of it helps hold down wages.”¹⁸⁶

Using basic theories of labor economics, it is easy to conclude that the tight labor market in the United States during the 1990s should have resulted in increased wages and increased job security for American workers.¹⁸⁷ However, from 1992-1996, most American workers' wages fell.¹⁸⁸ Many workers have to work two or more jobs, longer hours, and/or overtime to survive.¹⁸⁹ A living wage for one adult and two children is \$30,000 a year (a total calculated to include no luxuries), but many employers do not provide this amount to entry-level workers.¹⁹⁰

182. *Id.*

183. BRONFENBRENNER, *supra* note 25, at 5.

184. Lusane, *supra* note 16, at 440-441.

185. This is one reason that Title VII of the Civil Rights Act of 1964 was enacted. 42 U.S.C. § 2000 (e)(1)-(17) (1988) (prohibiting employment discrimination on the basis of race, color, religion, gender or national origin).

186. Louis Uchitelle, *Shifting Workplace; Renewed Corporate Wonderlust Puts a Quiet Brake on Salaries*, N.Y. TIMES, July 24, 2000, at A1 (quoting Harvard University economist Lawrence F. Katz).

187. BRONFENBRENNER, *supra* note 25.

188. *Id.* at 1.

189. See BARBARA EHRENREICH, NICKEL AND DIMED; ON (NOT) GETTING BY IN AMERICA (2000).

190. See *id.*

Working in a profitable industry and building a solid work record no longer translates into job security for Americans.¹⁹¹ "From individual plant closings to the virtual collapse of entire domestic industries, from wage concessions to lost or abandoned elections for union representation," the reality of globalization and capital mobility has a direct effect on the perception of lack of job security for American workers.¹⁹²

Although the nation was in the midst of an economic boom during the 1990s, it was estimated that nine out of ten Americans were fearful about job security.¹⁹³ Interestingly, workers today are three times more insecure about losing their jobs in the current economy than they were during the 1980-1981 recession.¹⁹⁴ This increased job insecurity can be partially attributed to NAFTA.¹⁹⁵

Changes in trade policy have a significant effect on perceptions of job stability. Americans realize that employers can easily find cheaper labor and imports in developing countries.¹⁹⁶ Fears of job loss have a direct relationship on wages. Employees are afraid to ask for wage increases because they understand that cheaper labor is available elsewhere, primarily Mexico.¹⁹⁷

B. *Impact of Threats of Plant Closure on Union Organizing Drives*

Cutting production costs is a dominant strategy for increasing manufacturers' profits.¹⁹⁸ American workers are aware of plant closings and "downsizing," and employers capitalize on this by keeping wages low.¹⁹⁹ NAFTA has furthered the need for companies to stay competitive in the global economy, and many employers use the threat of plant closures and capital flight as a bargaining chip in their anti-unionization campaigns.²⁰⁰

The typical threat of plant closure occurs once the perceived danger of unionization appears.²⁰¹ Many employers threaten their workers that

191. See Frances Lee Ansley, *Rethinking Law in Globalization Labor Markets*, 1 U. PA J. LAB. & EMP. L. 369, 372 (1998) (crediting globalization for the lack of job security in many blue-collar industries).

192. See *id.* at 372-73. See also COMMUNITY AND CAPITAL IN CONFLICT: PLANT CLOSINGS AND JOB LOSS (John C. Raines et al. eds., 1982) (describing individual plant closings and the effect on the communities involved).

193. BRONFENBRENNER, *supra* note 25, at 4.

194. *Id.*

195. Weintraub, *supra* note 7, at 307.

196. *Id.*

197. *Id.*

198. See Ansley, *supra* note 191, at 370-71 (finding that one way that employers are cutting production costs is to use third-world workers at lower wages).

199. BRONFENBRENNER, *supra* note 25, at 7.

200. *Id.* at 8.

201. See *id.* at 7; Ansley, *supra* note 191, at 374.

their plant will close down if a union is recognized.²⁰² Employers simply state that they cannot afford required union wages and benefits.²⁰³ Workers then are afraid to join the union because of the fear that the plant could close down and they would be left jobless.

A study commissioned by NAALC summarized that "half of all employers involved in private sector certification election campaigns threatened to shut down all or part of their operations if workers voted for a union."²⁰⁴ However, only 15% of the employers shut down all or part of its operations after the union won the election.²⁰⁵

This study reveals that employers are threatening to close manufacturing plants at an alarming rate, regardless of whether they actually will follow through with the threat after union success. The reality of NAFTA and the perception that companies can globalize and relocate give more credibility to threats of plant closure. The result of these threats indicates a direct relationship between NAFTA and union organizing drives. NAFTA reinforces the perception that employers are more mobile and can easily move if a union wins an organizing campaign.

NAALC's ineffectiveness and lack of sanctions, actual job losses, and the threat of job losses have all participated in impacting union organizing. NAFTA is the base of this combination of negative influences. Therefore, a FTAA will further the problems of union organizing drives, minorities, and women, if it is modeled after NAFTA's flaws.

C. *Exponential Impact on Women and Minorities*

Generally, trends that negatively impact American workers, like globalization, have an exponentially depressing impact on women and minorities. To put it simply, if NAFTA is bad for unions, then it is bad for women and minorities to the second power. Women and minorities have faced a history of inequalities, therefore adding to the problems associated with NAFTA through FTAA just exacerbates an already existing dilemma. This is why union membership and the benefits of collective bargaining are important for women and minorities.

202. See Ansley, *supra* note 191, at 374. The author describes an actual situation that occurred where if union members did not agree with company officials, management would make remarks such as "You're going to drive us to Mexico" or "This is the kind of thing that will force us to move to Mexico." *Id.*

203. Dickey, *supra* note 164, at 27.

204. NORTH AMERICAN AGREEMENT ON LABOR COOPERATION (NAALC), PLANT CLOSINGS AND WORKERS RIGHTS: A REPORT TO THE COUNCIL OF MINISTERS OF THE SECRETARIAT OF THE COMMISSIONS FOR LABOR COOPERATION (1997).

205. *Id.*

Women and minorities are subject to discrimination even today as evidenced by the "pay gap."²⁰⁶ Union membership, however, narrows the historic "pay gap" between whites and non-whites and between men and women. According to the U.S. Department of Labor's Bureau of Labor Statistics, workers that belong to unions earn 28% more than non-union members, and are more likely to receive health care and pension benefits.²⁰⁷ Women in unions earn 31% more than women who are not.²⁰⁸ Black workers make 37% more than non-unionized Blacks, while Latino workers earn 55% more than non-union Latinos.²⁰⁹

Furthering the plight of women and minorities, NAFTA is adversely affecting the manufacturing industry.²¹⁰ Women and minorities represent a significant portion of individuals losing their jobs due to NAFTA because of their location in the manufacturing industry.²¹¹ To make matters worse, the lost manufacturing jobs are replaced by service industry jobs which pay less and offer fewer benefits.²¹² Although NAFTA's goals are supposed to be gender neutral and racially blind, the consequences for minorities and women cannot be ignored. Corporations taking advantage of globalization may not have a racist or sexist intent, but they are effectively producing discriminatory results as well as exacerbating inequalities that have long existed in the American workplace.²¹³

A decrease in union organizing drives and the protections unionization offers can be directly linked to NAFTA, as can be seen in the effect of threats of plant closure. Unions are proven to help minorities and women because of their emphasis on equal pay and collective bargaining. If unions are impacted by NAFTA, then it has an indirect, but substantial effect on minorities and women who are aided by union membership.

206. AFL-CIO, UNIONS RAISE WAGES- ESPECIALLY FOR MINORITIES AND WOMEN, [hereinafter AFL-CIO, WAGES] available at <http://www.aflcio.org/uniondifference/uniondiff4.htm> (last visited Feb. 2, 2002).

207. *Id.* (analyzing the median weekly earnings of full time wage and salary workers for the year 2000); AFL-CIO, UNION WORKERS HAVE BETTER BENEFITS, [hereinafter AFL-CIO, BENEFITS] available at <http://www.aflcio.org/uniondifference/uniondiff6.htm> (last visited Feb. 2, 2002).

208. AFL-CIO, WAGES, *supra* note 206.

209. *Id.*

210. Lusane, *supra* note 16, at 446.

211. See Scott, *supra* note 163 at 2. Over seventy-five percent of the jobs lost due to NAFTA were in the manufacturing sector. *Id.* "Between 1993 and 1996, blacks lost 36,890 jobs, and Hispanics lost 22,520 jobs, numbers closely reflecting these groups' shares in manufacturing industries. Moreover, a disproportionate number of the jobs eliminated by NAFTA were manufacturing jobs." Rothstein & Scott, *supra* note 31.

212. Lusane, *supra* note 16, at 446.

213. *Id.* at 439 (writing that "global corporate norms, while perhaps not racist in intent, increasingly produce racist outcomes").

VI. ALTERNATIVES AND ENHANCEMENTS TO NAFTA – SUGGESTIONS FOR FTAA

“FTAA is like NAFTA on steroids.”²¹⁴

The trilateral free trade agreement between the United States, Mexico, and Canada is inherently distinguished from a hemispheric agreement that will encompass most of the Western Hemisphere, primarily due to its complexity.²¹⁵ However, NAFTA set the stage for FTAA, and is the basis for FTAA negotiations.²¹⁶

NAFTA would be an excellent model for FTAA if promoting corporate interests were its only purpose.²¹⁷ Although NAFTA instigated the process to enact FTAA,²¹⁸ other alternatives or alterations to NAFTA should be examined. This is because FTAA has the potential of having the same negative impact on unions, organizing drives, women, and minorities.²¹⁹ There are plausible alternatives to the NAFTA-NAALC model that work more for furthering workers' rights instead of the corporate agenda.

A. *Corporate Fines*

The National Labor Relations Board's (NLRB) traditional remedies for labor violations in the United States are not effective or coercive in preventing employers from violating workers' rights.²²⁰ Therefore, workers rights provisions included in a free trade agreement must be clear and

214. See AFL-CIO, *FAST-TRACK*, *supra* note 128.

215. Weintraub, *supra* note 7, at 312 (2000) (comparing NAFTA to the proposed FTAA).

216. *Id.* at 313 (noting, however, that hemispheric-wide free trade will not result in an expansion of NAFTA).

217. AFL-CIO, *FAST-TRACK*, *supra* note 128 (criticizing Congressional leaders and President George W. Bush for attempting to push fast-track legislation in order to move the Free Trade Area of the Americas (FTAA) agreement through Congress quickly); see also Weintraub, *supra* note 7, at 313 (determining that “FTAA will come into existence only if the U.S. president is granted fast-track authority”).

218. See Weintraub, *supra* note 7, at 304 (stating that it is incorrect to characterize the FTAA as an extension of NAFTA, but rather the FTAA is a single undertaking which leaves NAFTA intact).

219. See Blum, *supra* note 19, at 437 (claiming that environmental concerns have been kept off the FTAA agenda); see also Lopez, *supra* note 32, at 31 (comparing NAFTA's political concerns with those that potentially could affect the FTAA); AFL-CIO, *UNION DIFFERENCE: UNIONS ARE IMPORTANT FOR MINORITIES*, available at <http://www.aflcio.org/uniondifference/uniondiff12.htm> [hereinafter AFL-CIO, *MINORITIES*] (last visited Apr. 2, 2002).

220. See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787-1795 (1983) (agreeing with the Labor Reform Act remedy that would have allowed double wages and no deduction for mitiga-

forceful. Severe monetary penalties for individual companies that fail to follow labor standards are one suggestion.²²¹ Any system that intends to protect employee rights will only be as effective as the remedies afforded.²²² NAALC only allows for sanctions against the nation, i.e. nationwide enforcement.²²³ Therefore, there is a lack of responsibility for individual companies.

Monetary penalties would aid the United States particularly when manufacturers threaten plant closures during union organizing campaigns.²²⁴ There should be a substantial fine. NAALC fails to provide such a remedy,²²⁵ as no sanctions have been imposed to date.²²⁶ Since the corporate agenda focuses on capital gains, worker's rights violations should be remedied by imposing monetary fines on these businesses; therefore, any violation would motivate the corporate world to clean-up their business practices in a manner employers will pay attention to.

B. NAFTA-TAA

NAFTA-TAA provides beneficial data on workers displaced due to NAFTA.²²⁷ But, NAFTA-TAA has limitations and needs to be improved.²²⁸ The FTAA should implement a program similar to NAFTA-TAA, but one that also considers all jobs affected by the implementation of FTAA, not just the manufacturing industry. Applicants will need to demonstrate the connection between their job loss and the implementa-

tion for employees who have been discriminatorily discharged during a union organization campaign.)

221. See NAALC, *supra* note 2. A monetary fine can only be imposed if a nation pervasively fails to enforce its own national labor laws. See *id.*

222. Lack of remedial power for the National Labor Relations Board was one concern that initiated the proposal of the Labor Reform Act of 1977. See COX ET AL., *supra* note 38, at 253. The Labor Reform Act passed the House of Representatives in 1977, but fell victim to a nineteen-day filibuster in the Senate. See S. 2467, 95th Cong. (1978); H.R. 8410, 95th Cong. (1977).

223. See NAALC, *supra* note 2; see also Grimm, *supra* note 139, at 195 (explaining that NAALC's enforcement operates through National Administrative Offices (NAOs)).

224. Threats of plant closure to prevent union success are illegal under the National Labor Relations Act, but no fine or monetary penalty is imposed. See NLRB, *supra* note 44. But see *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) (holding that a complete plant shutdown by an employer does not violate the National Labor Relations Act if the employer was not trying to discourage unionization elsewhere).

225. Bobbi-Lee Meloro, *Balancing the Goals of Free Trade with Workers' Rights in a Hemispheric Economy*, 30 U. MIAMI INTER-AM. L. REV. 433, 455-56 (1998) (noting that NAALC has been criticized for its weakness and ineffectiveness).

226. See Garvey, *supra* note 127, at 16 (stating that sanctions are unlikely because the structure of NAALC is designed for cooperative resolution by consent to an action plan).

227. See Raftery, *supra* note 80, at 160-61.

228. See *id.* at 186-87.

tion of FTAA. Administering welfare programs are expensive, but such programs are the only effective means to track the inevitable American job losses caused by a free trade agreement.

C. *Private Litigation*

Another alternative is private litigation. Free trade agreements fail to expressly allow private rights of action that enable national law to enforce claims through domestic courts.²²⁹ Domestic common law tort claims, such as, negligence, intentional torts, or nuisance, are options for individuals opposing American corporations on foreign soil.²³⁰ Parties have had success using case-by-case litigation in United States courts.

In *Dow Chemical v. Alfaro*,²³¹ the Texas Supreme Court found that the claims of foreign workers against their United States employers may be tried on the merits, despite Dow Chemical's claim of forum non conveniens.²³² However, claims for personal injuries occurring outside the United States caused by an American employer's negligence would usually face problems with forum non conveniens.²³³

D. *Fast-Track Authority*

Beginning in 1974, the United States' Congress used fast-track authority for all significant trade legislation.²³⁴ Fast track allows international trade agreements to be pushed through Congress without any amendments.²³⁵ Opponents of globalization suggest, "as it stands, fast-track would aid powerful corporations searching the globe for cheap labor—lowering standards globally for workers' right, public health, consumers and the environment."²³⁶

Both former President Bill Clinton and President George W. Bush have failed to get fast-track approval for FTAA. The last fast-track authority expired at the end of 1994.²³⁷ In 1997, Congress refused fast-track

229. Garvey, *supra* note 127, at 24.

230. *Id.* at 27.

231. 786 S.W.2d 674 (Tex. 1990), *cert. den.*, 498 U.S. 1024 (1991).

232. *Dow Chemical v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. den.*, 498 U.S. 1024 (1991) (allowing foreign employees of U.S. multinational corporations to sue in Texas courts).

233. Garvey, *supra* note 127, at 27-30 (citing *Piper Aircraft v. Reyno* 454 U.S. 235 (1981) as the leading authority on the forum non conveniens doctrine).

234. See Mayer, *supra* note 87, at 337.

235. Charles Tiefer, "Alongside" the Fast-track: *Environmental and Labor Issues in FTAA*, 7 MINN. J. GLOBAL TRADE 329, 329 (1998).

236. AFL-CIO, FAST-TRACK, *supra* note 128.

237. See Mayer, *supra* note 87, at 337 (stating that the last fast track authority ended when Congress approved the Uruguay Round of the GATT).

authority that would have helped approve FTAA more quickly.²³⁸ In 2001, President George W. Bush attempted to get passage of "trade promotion authority," but the fast track was again rejected by Congress.²³⁹

Opponents of NAFTA utilize a "race to the bottom" theory, which contends that multinational corporations will find the cheapest labor and the least regulations possible, particularly in Mexico.²⁴⁰ The predictions were realized. The documented industrial flight that has occurred in the years since NAFTA's passage justified Congress' refusal to grant fast-track authority.²⁴¹ For the problems created by NAFTA, Congress should continue not to enact fast track authorization for FTAA, as it did with NAFTA.

E. *Eliminating "Side" Accords*

Unlike NAFTA, labor concerns should be part of the main text of FTAA, instead of a separate side agreement.²⁴² This concept was utilized in the U.S.-Jordan Free Trade Agreement.²⁴³ Both countries committed to core labor standards and enforcing labor laws.²⁴⁴ Although the agreement between the United States and Jordan is not a comprehensive solution, it does provide a starting point for FTAA, with the notion of emphasizing labor concerns within the document itself.

Inclusion of labor standards in the main text indicates that violators are more likely to be punished. Presumably, this approach allows labor rights to be "enforced through the same powerful state imposed trade sanctions available for the resolution of commercial and other 'normal' disputes."²⁴⁵

VII. CONCLUSION

NAFTA, along with the global economy, has made many employees fearful that they are dispensable. Job insecurity and threats of relocation have made many American workers afraid to join unions. NAFTA also has a negative effect on minorities and women, which is especially evi-

238. Tiefer, *supra* note 235, at 329; *see also* Mayer, *supra* note 87, at 337.

239. Parks, *supra* note 33, at 17.

240. *See* Garvey, *supra* note 127, at 7; *see also* Finkin, *supra* note 145, at 148 (criticizing international regulations that do not promote a "race to the top" in developing countries).

241. *Id.*

242. *See* Dickey, *supra* note 203, at 27.

243. *See id.* On October 24, 2000, former President Bill Clinton signed the United States-Jordan Agreement. *Id.*

244. *Id.* at 27 (noting that trade between the U.S. and Jordan is significantly less than trade between the three NAFTA countries).

245. *See* Ansley, *supra* note 191, at 410-11.

dent in the manufacturing industry. FTAA could have the same devastating impact if NAFTA is its blueprint.

The fact that globalization has a negative impact on union organizing drives is important to women and minorities. Union membership provides the power of collective bargaining, while highlighting the need for equal standards for all workers.

Admittedly, NAFTA made a step in the right direction through NAALC as it recognizes the connection between free trade and workers' rights. But, NAFTA and NAALC fall far short of the perfect model. If NAFTA is the blueprint, then FTAA, which will encompass 34 countries in North, Central, and South America,²⁴⁶ will have a more devastating effect on union organizing, minorities, and women. Therefore, other alternatives should be utilized. Union organizing drives and workers' rights should not continue to pay for free trade.

246. See AFL-CIO, WORKING FAMILIES, GLOBAL UNIONS RALLY FOR FAIR TRADE, available at http://www.aflcio.org/news/2001/0418_ftaa.htm (last visited Mar. 3, 2002).